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IN THE SUPREME COURT OF THE UNITED STATES.
October Term 1956.

No. _____

BEN HUR COAL COMPANY, a Corporation, *Petitioner*,
vs.
EARL WELLS and M. A. BERMAN, co-partners doing business as STARR COAL COMPANY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that a writ of certiorari issue to review the action of the United States Court of Appeals for the Tenth Circuit affirming the judgment of the United States District Court for the Eastern District of Oklahoma.

Citation of Opinion Below.

The opinion of the Court of Appeals, Ben Hur Coal Company, a corporation *vs.* Earl Wells and M. A. Berman, co-partners doing business as Starr Coal Company, has not yet been officially reported and is set forth in Appendix I.

Jurisdiction.

Pursuant to its opinion the Court of Appeals entered judgment on February 13, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented for Review.

1. This is an action predicated upon Title 15, U. S. C. A., Section 13a, commonly known as the Robinson-Patman Act. Petitioner asserts that the Court of Appeals in affirming the judgment of the trial court failed to follow applicable decisions of this Court, and in particular, but not

limited to, that of *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, 75 Sup. Ct. 148, 99 L. ed. 145.

2. That part of the Robinson-Patman Act upon which petitioner's action was based states:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce * * * to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

A violation of this statute requires a finding, *first* that unreasonably low prices were charged for goods sold in interstate commerce, and *second* that such was done with intent to destroy competition or eliminate a competitor. The trial court made numerous findings of fact which were contrary to the undisputed evidence in this case, then based upon these erroneous findings the trial court concluded as ultimate findings that the respondents' prices were not unreasonably low, and that they had no intention of destroying the petitioner as a competitor. Although the trial court's erroneous findings upon highly material facts were brought squarely to the attention of the Court of Appeals that court declined to meet squarely the issues so raised and, in effect, approved them. The undisputed evidence discloses that the respondents for no legitimate business or economic reason slashed the price of domestic coal to an unreasonably low price, and in fact below their cost of production. The respondents for reasons which we shall subsequently divulge were angry with the officers of the petitioner corporation, and aside from the respondents' protests of innocent intent the overwhelming weight of the undisputed evidence in this case discloses that the intent of the respondents was malicious. In brief, this is not

a case where there was a conflict of evidence as to the material facts. This being true, petitioner asserts that the ultimate questions of whether the respondents sold goods at unreasonably low prices, and whether such price cutting was for the purpose of eliminating the petitioner as a competitor, which can only be arrived at in the absence of a confession on part of the respondents, as an inference from the undisputed material facts, becomes a question of law, or a mixed question of law and facts. Petitioner asserts that under the overwhelming evidence in this case judgment should have been enterd in favor of the petitioner and against respondents.

3. In affirming the judgment of the trial court the court below stated in its opinion as material facts certain matters which were contrary to the undisputed evidence in the case. In short, petitioner respectfully asserts that the opinion and judgment of the Court of Appeals, as was the judgment of the trial court, was predicated upon a series of false premises and in consequence this Court should not permit its judgment to stand.

The Statutes Involved.

Title 15, Section 13a, U. S. C. A.:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and

quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any such person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."

Title 15, Section 15, U. S. C. A.:

"Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Statement.

The petitioner is Ben Hur Coal Company, a corporation. The respondents are Earl Wells and M. A. Berman, co-partners doing business as Starr Coal Company. For the sake of brevity we shall refer to the petitioner as Ben Hur, and the respondents as the defendant partners. Federal jurisdiction was invoked by Ben Hur under the above cited anti-trust laws.

The printed record in the court below is voluminous and is separately presented. Attached thereto, but not printed under the rules of the lower court, are defendants' Exhibits Q, S, T, and U. When referring to the printed rec-

ord in the court below we shall give the page, and when referring to the latter exhibits we shall call the Court's attention to the fact that they are not in the printed record by stating that photostats of the exhibits are attached thereto.

For many years three mines had operated in the Henryetta, Oklahoma, coal field, Ben Hur, that of the defendant partners, and the Atlas mine owned by third parties. These mines were adjacent, operated from a common and uniform seam of coal, and their mining operations were for all practical purposes identical. These mines produced coal for the domestic market. The operations of Ben Hur had been profitable for many years until the price cuts instituted by the defendant partners on November 1, 1953 (Appendix II). The relationship between the officers of Ben Hur and the defendant partners had been extremely friendly for many years. They lived together in a small town. The diary of Ellis Taylor, president of Ben Hur, reflected that in a five-year period ending December, 1949, he had had 105 meetings with the defendant Wells of sufficient importance to mention therein (R. 129). During 1949, the coal industry suffered from nationwide strikes. The defendant Wells was the president of the Oklahoma-Arkansas Coal Operators Coal Association and negotiated with the Union for the operators. Due to Ben Hur's losses Ellis Taylor determined that it would be impossible to further withstand the demands of the Union and that it should sign a new Union contract (R. 130, 131). In December, 1949, he met with the defendant Wells who advised him strongly against doing so. Ben Hur then signed up with the Union (R. 131, 132). The defendant partners admitted that they did not like it (R. 154, 396, 435, 436). Ellis Taylor testified that thereafter his relationship with the defendant Wells became

very cool; that Mr. Wells thereafter barely spoke to him on the street, and in the next four years his diary reflected only two meetings, both on business, with the defendant Wells (R. 132). This represented the first rift between the parties.

The second rift occurred as follows: Prior to 1951, the defendant partners were considering going out of the coal business (R. 155). Mr. John T. Cole owned 6000 acres of coal royalty in the Henryetta field and all of the mines there operated in part upon his holdings. In 1950, Mr. Cole entered into negotiations with Ben Hur to see if some arrangement might be worked out to protect his holdings (R. 155, 156). These negotiations continued spasmodically for about a year (R. 133), and ultimately resulted in a written contract dated October 1, 1951, which gave Ben Hur an option upon the coal holdings of Mr. Cole (R. 134). Before this option agreement was executed, however, Mr. Cole, about April, 1951, contacted the defendant Berman and showed the proposed option contract to him (R. 156). He stated that he would have entertained any reasonable proposition from the defendant partners, but the defendant Berman told him they were not interested (R. 157). The defendant partners had a ten-year coal lease from Mr. Cole which expired on March 1, 1953, if coal production had not commenced thereon by that time. This 120-acre lease contained about 360,000 tons of coal (R. 158). Without this coal the defendant partners had about two and a half years of coal reserves. The defendants permitted the lease to expire and Mr. Cole requested that Ben Hur take the property pursuant to its option contract with him (R. 135, 163). When the defendant partners learned that their lease had expired the defendant Berman went to Mr. Cole and offered $50,000.00 for a new lease on the 120 acres, but

Mr. Cole told him that under his contract with Ben Hur he could not do so (R. 158, 159). The defendant Berman suggested that perhaps some legal loophole existed in the option contract with Ben Hur which might enable Mr. Cole to give the defendants the lease (R. 389, 390). The defendant Berman testified that the defendants were "highly distressed" by this matter (R. 393). When Mr. Cole informed Ben Hur of his talk with the defendant Berman, Ellis Taylor suggested that he contact the defendant partners and see if some sort of an agreement in connection with the lease could be worked out (R. 136, 137). Mr. Cole contacted the defendants, but they declined (R. 161). About six months later, without warning, in the heart of the winter season the defendants suddenly cut the price of coal 85 cents a ton, or to $6.50.

Meanwhile the interest of the defendants in the coal business which had flagged in 1950, was revived in 1951 when the defendants commenced selling steel coal to Sheffield Steel Company of Houston, Texas. At the time of the defendants' first price cut the price of steel coal was $6.00 a ton, whereas the price of domestic coal was $7.35 a ton. Despite this disparity in prices the profit on steel coal was much greater than upon domestic coal for reasons which we explain in Appendix III. Suffice it to say, however, that a mine operator selling four tons of steel coal receives $23.80 while four tons of domestic coal brought $23.60 at the prices stated. The margin of profit on coal is rather slim, consequently, when the defendants cut the price of domestic coal 85 cents a ton their dollar realization for four tons of domestic coal was reduced to $21.05. The first price cut caused devastating losses to Ben Hur, (Appendix II) and drove the Atlas mine completely out of business eliminating it as a competitor of the defendants (R. 84, 85).

Observing that Ben Hur had not been eliminated by their first price cut, on June 1, 1954, the defendants further cut the price of domestic coal from $6.50 a ton to $6.00. The plaintiff to exist was compelled to follow these cut prices. In November, 1954, despite the $6.00 price of the defendants Ben Hur arbitrarily raised its price to $6.60 a ton, and despite the price differential was able to sell 8,934.75 tons of domestic coal (R. 169). Observing this, then on January 1, 1955, the defendant partners increased their price of domestic coal to $6.50 a ton, and Ben Hur followed suit. On June 1, 1955, the defendants again reduced the price to $6.00 a ton.

As a result of the price cutting of the defendant partners the plaintiff suffered a loss in its fiscal year ending May 31, 1954, of $17,089.22, and in 1955, a loss of $46,976.68 (Appendix III). In 1936 the capitalization of Ben Hur was $50,000.00, and at the time of the first price cut its fixed assets were $400,000.00 (R. 164). On the latter date Ben Hur had liquid assets of $101,191.00, and current liabilities of $100,113.72 (R. 167). As of the trial of this cause in September, 1955, Ben Hur had liquid assets of $70,623.93, and current liabilities of $150,789.93 (R. 167). Ben Hur is a family corporation and among its current liabilities was $79,017.43 loaned to it by its owners.

Henryetta domestic coal is regarded as the premium quality coal in its trade area (R. 60, 67, 80, 104, 116, 122, 216, 259, 277, 438, 456, 448, 464), and has always commanded a premium price over its competitors (R. 72). All coal is in a sense competitive. However, the record discloses that the principal competitors of Henryetta coal were Southern Illinois and Catoosa coal. The variations in the prices of these coals is set forth in Appendix IV. It will be noted that the prices of all of these coals increased from 1951

until the defendant partners first price cut of November 1, 1953. The $7.35 a ton price for Henryetta domestic coal had been in effect since October 1952. The only price cut by the competitors was that of southern Illinois, which reduced its price from $6.55 to $6.30 in March, 1953, more than six months before the defendants' first 85 cent price cut. The $6.30 a ton southern Illinois price thereafter remained in effect for the next two years until the trial of this cause, and it was not until the second price cut of the defendants that Catoosa coal was compelled to cut its prices, as stated by the witness McNabb who was the producer of Catoosa coal. He further stated that if the defendants had not cut the price of Henryetta coal that in his opinion he would have sold just as much Catoosa coal at his original price as he was compelled to do at cut prices (R. 61). This was confirmed by the witness Stock, who was vice-president of the company marketing Catoosa coal (R. 262).

The only other coal which might be considered a competitor of Henryetta coal was that of western Kentucky which was much inferior in quality (R. 262). The defendants asserted that severe price cuts in respect to this coal occurred in the winter season of 1952-1953, and that this was one of their reasons for the price cuts. The defendants at the trial introduced as their Exhibit G their various and sundry price lists reflecting the prices of western Kentucky coal. These price lists at various prices stated are summarized at page 549 of the record. Since western Kentucky coal varies considerably in quality and is sold under various trade names, the prices from year to year of any particular coal cannot be traced. The defendants made no effort to explain these exhibits and as a result the price lists are unintelligible. By picking and choosing it

is just as easy to prove that western Kentucky coal went up in price as it is to prove that it went down.

The wholesalers handling Henryetta coal who testified on behalf of both Ben Hur and the defendants in this case stated that Henryetta coal was by far the best seller of premium domestic coals in its trade territory, and that they handled very little western Kentucky coal (R. 230, 234, 240, 563, 454, 55, 114). The defendants' witness Stock, vice-president of Sinclair Coal Company, one of the largest coal companies in the world and which sold approximately half of the domestic coal in its trade territory, stated that it sold western Kentucky coal "occasionally, but a very small amount" (R. 248).

The expenses incident to the production of coal had risen steadily and substantially from 1949 onward. The miners' vacation pay had gone up from $25.00 to $100.00 a year; Social Security payments had increased from 1% to 2%; contributions to the Union Mine Workers Welfare Fund had increased from 20 to 40 cents a ton; the miners' pay scale of $14.13 a day had increased to $17.63 a day (R. 168, 169).

Let us now direct our attention to the effect of their price cuts on the defendants' profits. Their books are kept on a fiscal year ending September 30th. Since normal mining operations involve periodic extensions of mine shafts through solid rock, a consideration of the defendants' operations for a shorter length of time than a year would be likely to give a false impression of their normal expenses. In the production of coal about one-quarter of the tonnage produced is coal dust commonly referred to as "fines" or "bug dust." Consequently when four tons of domestic coal are produced selling for $7.35 a ton there is one ton of

dust remaining which can only be sold for $2.85 a ton. On the other hand, steel coal is sold bug dust and all for $6.00 a ton. This accounts for the extraordinary profit on steel coal even at a lesser price per ton. Moreover, domestic coal must be put through extra processes and machinery in order to prepare it for the market, as well as oiling it, which increases its cost. A dispute arose at the trial between the parties as to the added expense of preparing domestic coal in comparison with steel coal. The defendants contended that the added cost of machinery, power and whatnot in preparing domestic coal was so insignificant that it should be disregarded, and that the only added expense was the cost of spray oil and advertising. It was upon this basis that the defendants calculated their profits and losses on steel and domestic coal. While the petitioner does not agree with this contention of the defendants, nevertheless throughout this brief in discussing the profits and losses of the defendant their own method of calculation has been employed since it represents the best foot they can put forward. Calculated on this basis the profits and losses of the defendants for their fiscal years ending September 30, 1953, 1954 and 1955 are set forth in Appendices V, VI, and VII.

According to the defendants' own method of calculation, in their fiscal year ending September 30, 1953, which was immediately before their first price cut, they enjoyed the greatest profit that they ever had experienced up to that time. Their total profit was $191,928.77. On domestic coal they made a profit of $71,870.18, or an average profit per ton of 71 cents. In computing profit on domestic coal we have, of course, included in the calculation the effect of selling bug dust which inescapably resulted from its production. On the other hand, the defendants sold steel coal at

$6.00 a ton and made a profit of $120,058.59, or an average profit per ton of $1.04. Such, then, was the rosy financial picture of the defendant partners' operation in the fiscal year immediately before their first price cut.

Now let us see what happened in their fiscal year following their first price cut on November 1, 1953 (Appendix VI). In their fiscal year ending September 30, 1954, the defendants made a profit of $143,858.29, or an average profit of $1.05 a ton on steel coal. In October, 1953, which was the first month of that fiscal year while the defendants were selling domestic coal at the original price of $7.35 a ton they made a profit of $8,968.52, or an average profit per ton of 75 cents. In the succeeding eleven months of that fiscal year, selling at the cut prices of $6.50 and $6.00 a ton the defendants made a profit of $1,493.83, or less than 2 cents a ton. Moreover, during that fiscal year the defendants sold coal at $6.00 a ton at an absolute loss to themselves of $6,242.80. Their own accountant Stanfield admitted that the defendants sold at a loss at the $6.00 price during that fiscal year (R. 316).

The petitioners' vice-president Gene Taylor went to the defendants and told them that the price cuts were ruining Ben Hur and begged them to restore the price to a reasonable figure, but the defendants declined (R. 391, 428). He further stated that the defendant Wells told him that he was sorry for the Taylor family, "We couldn't make it if it wasn't for the steel coal * * *, but he mentioned in so far as Ellis Taylor was concerned that he was forced to teach him a lesson" (R. 101, 102). The defendant Wells denied the latter statement, which was practically the only direct dispute in the evidence at the trial of this case. The defendant Wells, however, when asked the question "* * *

If it weren't for this steel contract you would sell at this reduced price on domestic coal? A. I would not have been in the coal business * * * if I had not had the steel order" (R. 432).

After the defendants had made only a meager profit selling domestic coal in the first year of their cut prices they then went into what is known as a "retreating operation" (R. 66, 395, 477). In a "retreating operation" normal development work in the mine ceases, all tunnels have been driven and paid for, and the mine operator simply backs out of the mine, removing only coal and letting it collapse behind him. Consequently, in this abnormal situation the cost per ton of mine labor, vacation pay, Social Security, and unemployment tax, workmen's compensation insurance, timbers, supplies and repairs, is severely curtailed and the profits of a mine operator rise sharply (R. 476, 482).

At the trial of this case in September, 1955, the books of the defendants for the first ten months of their fiscal year ending September 30, 1955, were available. Due to a substantial increase in their sales per month of steel coal plus the economies affected by their retreating operation, resulted in a tremendous overall profit to them. Their profit on domestic coal increased from less than 2 cents a ton in the prior fiscal year at the cut prices to 49 cents a ton, or a total profit of $43,895.37, whereas they made a profit of $192,997.55 on steel coal, or an average profit per ton of $1.58.

Of course, the defendants denied that their price cuts were designed for the purpose of injuring Ben Hur or eliminating it as a competitor. Their position was that the price cuts were dictated by sound business and economic considerations, several among which were the following:

1. Because the defendants immediately before their first price cut had a substantial amount of domestic coal on hand which was unsold, and were faced with the prospect of having to shut down their mine.

The defendants testified that on the last day of October, 1953, immediately before their first price cut, they had 22 no-bill cars of domestic coal on the track; that is, unsold cars. "We are done." (R. 387, 424) This assertion is not supported by the facts. In the four months immediately preceding their first price cut, the defendants sold 79,883.77 tons of coal, whereas in the same months of the preceding year they had merely sold 60,811.80 tons (Appendix VIII). A coal car holds approximately 45 tons of coal (R. 486), consequently 22 cars represented approximately 990 tons of coal. The defendants' average daily coal production from July to October, 1953, inclusive, was 629 tons; their average daily production for the month of October 1953 alone was 744 tons. In brief, the 22 cars of unsold coal represented less than two days' coal production. As previously indicated, the defendants made a handsome profit on domestic coal of $8,968.52 in the month of October 1953 (Appendix VI).

2. Because Ben Hur had been guilty of price cutting and the price cuts of the defendants were designed merely to meet such competition.

In searching for evidence of price cutting on the part of Ben Hur the defendants examined Ben Hur's books from July 7, 1949, to March 1955. Defendants' Exhibit P (R. 579-583) represents their findings. These represented only ordinary business adjustments which were made by Ben Hur when the tonnage of coal shipped did not coincide with the amount supposedly sold, was not of the proper quality,

had been shipped in the wrong type of coal car so that it could not be unloaded at its destination, etc. (R. 471) The explanation of these matters is set out in plaintiff's Exhibit 19 (R. 523-540, incl.). All this boils down to the fact that in the 6 year period under consideration Ben Hur sold $3,272,320.57 worth of coal and its total coal sale adjustments during that time totaled merely $3,432.92, which represents an adjustment of one mill upon each dollars' worth of coal sold (R. 474). The defendants' contention was that these adjustments represented secret rebates which would amount to price cutting. As a matter of fact, defendants' Exhibit P discloses that the total amount of price adjustment made by Ben Hur from January 1 to October 31, 1953, the ten months before the defendants' first price cut, amounted to only $217.26.

In a further effort to prove Ben Hur guilty of price cutting the defendants examined all of its coal sales below its scheduled prices from October 7, 1952, to February [illegible], 1953, the results of which are set forth in defendants' Exhibits L, M, N, O and Q (R. 565, 575, incl.).

The witnesses for Ben Hur explained that these alleged price reductions consisted of allowing a 60 cent instead of a 50 cent commission to the wholesaler when coal was sold to the Farmers Union; that some coal was sold in the summer for future delivery in the winter, at which time the price had changed, etc. (R. 78, 79, 467-470, incl., 480).

The testimony on this matter is rather voluminous and instead of taking the time of this Court to discuss it all we think it might be well merely to let the Court know how much is involved in the defendant partners' contention that Ben Hur was guilty of price cutting. In the period from October 1, 1952, until September 30, 1953, we find that the

amount of the alleged price cuts total merely $708.39, during which period Ben Hur sold 88,713.37 tons of domestic coal. Consequently, this so-called price cutting would average less than one cent per ton.

The defendants testified that they had received numerous complaints from their wholesalers that Ben Hur was guilty of price cutting. Numerous witnesses testified for the defendants that they had heard such reports, but not a single one had any personal knowledge of such matters (R. 220-222, incl., 593-594, 243, 244, 258, 259). To all of this testimony Ben Hur objected that the same was hearsay. The defendant Wells testified he had received numerous letters from his wholesalers complaining of Ben Hur's price cutting. He was able to produce, however, only five letters (defendants' Exhibit X, R. 420-421). These were dated August 23 and 31, 1948, and October 10, 1953 (R. 586). The defendant Wells admitted that he had never made any effort to discuss these alleged complaints with the officers of Ben Hur (R. 434).

The undisputed testimony disclosed that when the mine operator sold domestic coal that it became the property of the wholesale coal dealer, f. o. b. mine and the coal operator had no further control over the coal or its ultimate sales price (R. 482, 483). As a matter of fact, the defendant Wells admitted that the vice-president of Ben Hur came to him in June, 1954, and suggested that if the defendants were concerned about alleged price cutting by Ben Hur that it was willing to enter into a sales agency and permit the defendants to market all Henryetta domestic coal, but the defendants declined (R. 391, 428).

3. Because it was necessary to bring Henryetta coal in line with the prices of its competitors.

We have previously discussed this matter and pointed out that the only serious competitors of Henryetta coal were the quality coals of southern Illinois and Catoosa coal from Oklahoma, and to a lesser extent the inferior coals of western Kentucky. There was some testimony that there were price wars involving western Kentucky coal in the winter season of 1952-1953, but that thereafter its prices went up again (R. 118). From the price lists introduced by the defendants in the trial of this case disclosing the price of western Kentucky coal, which were summarized on the schedule prepared by the plaintiff which is set out on page 549 of the record, it would be impossible to find anything whatsoever about the price trends of western Kentucky coal. On the other hand, the only price cut in southern Illinois coal was from $6.55 a ton to $6.30 a ton, which occurred in March 1953 (Appendix IV). The latter prices remained in effect at all times thereafter until the trial of this cause. When the defendants ultimately cut the price of Henryetta coal to $6.00 a ton this was the first time that anyone could recall Henryetta coal was selling for less than southern Illinois coal (R. 59, 125, 252, 278, 442, 464). One fact might be noted about southern Illinois coal. In the spring of each year after the winter domestic coal season it is customarily offered at a discount of about 75 cents a ton for the first month, 50 cents a ton for the second, 25 cents a ton for the third, after which it is restored to its list price (R. 49, 116, 218, 219, 276, 421). Such a seasonal discount had not been the custom in the Henryetta coal field (R. 49, 138).

As far as Catoosa coal was concerned (Appendix IV) its price of $5.85 a ton had been established in December,

1952. This continued in effect until after the second price cut of the defendants to $6.00 a ton when Catoosa was compelled to reduce its price to $5.25. The producer of Catoosa coal stated that he always sold under Henryetta coal, not because he liked to, but because he had to (R. 60).

The testimony was overwhelming that although the market for domestic coal has steadily declined through the years Henryetta coal has maintained its share of that market (R. 49, 74, 77, 105, 110, 405).

The witnesses stated that reasonable fluctuations in the price of southern Illinois coal had little or no effect upon the sales of Henryetta coal (R. 56, 57, 112, 456).

4. That the price cuts would stimulate the defendants' sales of domestic coal, and that they would reap the benefits of mass production by increasing their total combined tonnage of steel and domestic coal.

The bare fact is that the price cuts of the defendants did not stipulate their sales of Henryetta domestic coal. In their fiscal year ending September 30, 1953, one month before the price cuts, they sold 101,153.10 tons of domestic coal, while in their fiscal year ending September 30, 1954, the last eleven months of which they sold at cut price, their domestic coal tonnage dropped to 95,067.05 tons (Appendix V and VI). Despite this, the defendants' witnesses, who were coal wholesalers, cheerfully stated that at the original price of $7.35 a ton they were losing customers to competitive coals and they were losing customers right and left. They next cheerfully testified that after the defendants' price cuts their coal sales increased, they recovered lost customers, and so on. By way of illustration see pages 242 and 243 of the record.

The fallacy in the suggestion that cutting the price of Henryetta coal would stimulate sales is this: The retail coal dealers never cut their retail prices upon Henryetta coal or its competitors as a result of the defendants' price cutting campaign (R. 58, 73, 82, 104, 118, 124, 276, 407, 442, 455, 448, 465). Nearly all of the witnesses concurred in the belief that the defendants' price cuts did not stimulate the sales of Henryetta domestic coal (R. 68, 69, 73, 81, 105, 112, 117, 124, 407, 448, 464).

The evidence disclosed that in a contracting market reasonable changes in the price of Henryetta domestic coal would not affect its volume of sales (R. 69, 112, 127, 404, 456).

The testimony of the wholesale and retail dealers disclosed that there was considerable inertia on the part of retail domestic coal consumers to change brands of domestic coal despite changes in prices (R. 49, 106, 264).

The retail dealers who testified in this case were unanimous in the opinion that they had not, would not, and could not reduce their retail coal prices in the face of a declining market (R. 109, 278, 443, 457, 464, 465). It was the opinion of all of Ben Hur's witnesses that if the defendants had not instituted their price cuts that as much Henryetta domestic coal would have been sold at the original price of $7.35 a ton as was actually sold at the cut prices (R. 50, 69, 75, 77, 82, 107, 113, 117, 125). The defendants' witness Renstrom concurred in this opinion (R. 278, 279). The defendants' efforts to refute the foregoing testimony are epitomized in the testimony of their witness Eviston, who testified that at $7.35 a ton in his opinion "the price of coal was too high to move it in the competitive market at that time" (R. 255).

Here we direct the Court's attention to the fact that in September 1953 the defendants sold 14,065.15 tons, and in October 11,745.85 tons of domestic coal at $7.35 a ton (plaintiff's Exhibit 10, R. 509). The defendants asserted that their price cuts were necessary in order to increase their total coal tonnage, both steel and domestic, so that they might enjoy the efficiencies resulting from mass production. The efficiencies enjoyed by the defendants as a result of increasing their production were greatly exaggerated. It will be noted that in their fiscal year ending September 30, 1953, immediately before their first price cut (Appendix V) the defendants' total combined tonnage was 216,638.80 tons, whereas in their fiscal year ending September 30, 1954, 11 months of which was at cut prices, their total combined tonnage was 231,572.55 tons (Appendix VI). This represented a total production increase of 14,933.75 tons in the second year over the first. This increase was due to a great increase in sales of steel coal, because the domestic coal sales had declined. Since the wage scale was the same in the two years under consideration and the selling price of defendants' steel coal was likewise identical, we would naturally expect the efficiencies of "mass production" to be reflected in the defendants' profits on steel coal. In their fiscal year ending in 1953 their average profit per ton on steel coal was $1.04, whereas in their fiscal year ending in 1954, it had increased to $1.05 a ton. Thus the efficiencies of mass production led to an increase in profit on steel coal of approximately $1,365.06, while their profits on domestic coal slumped from 71 cents a ton in 1953 to less than 2 cents a ton at the cut prices, or from $71,870.18 profit on 101,153.10 tons of domestic coal to $1,493.83 on 83,062.06 tons sold at cut prices.

ARGUMENT.

Erroneous Findings of Fact Made by the Trial Court.

The trial court inferred that the defendants' cut prices were not unreasonably low, and that they had no intent to destroy competition or eliminate Ben Hur as a competitor, from its following erroneous findings of fact:

1. In its Finding of Fact No. 5, the trial court found that the defendants did not sell domestic coal below their cost of production (R. 28). This in the teeth of the fact that the defendants' books showed that they sold $6.00 coal in their fiscal year ending in September 1954, at a dead loss, and their own auditor admitted that such was true (R 316).

2. In Finding of Fact No. 8 the trial court found "the actions taken by the defendant company were motivated by sound economical considerations" (R. 29). The evidence in this case overwhelmingly demonstrates that the considerations for the price cuts were neither "sound" nor "economical."

3. In Finding of Fact No. 13 (R. 30), the trial court found that "beginning in the spring of 1953, the trend of competitive prices for domestic coal had been generally downward." This is unsupported by the evidence. In March 1953, the price of southern Illinois domestic coal was reduced from $6.55 to $6.30 a ton, and thereafter remained unchanged until the trial of this case, except for seasonal discounts which had been its practice for many years. The ultimate reduction in the price of Catoosa coal resulted solely from the price cuts of the defendants as testified by the witness McNabb who was the producer of Catoosa coal (R. 60, 61). On the other hand western Kentucky coal was

never a serious competitor of Henryetta coal, and from the record in this case it is impossible to determine whether its prices went up or down.

4. In its Findings of Fact Nos. 16 and 17, the trial court found that the price of domestic coals from southern Illinois and western Kentucky were reduced in the spring of 1953, and thereafter on November 1, 1953, the defendants reduced their price from $7.35 to $6.50 a ton (R. 31). The insinuation here was that the defendants' prices were in response to price cuts of their competitors and ignores the fact that the price cut on Illinois coal, which was made 8 months before, was only 25 cents a ton, whereas the price of Henryetta coal which had always been higher than Illinois had been reduced first 85 cents and later $1.35 a ton.

5. In Finding of Fact No. 18, the court found that the prices of southern Illinois and western Kentucky coals were reduced in the spring of 1954 to levels which had never been reached by Henryetta domestic coal (R. 31). The record does not bear this out. There is no evidence of any price reduction upon western Kentucky coal in the spring of 1954. There was no reduction by southern Illinois of its base price of $6.30 a ton at any time during the defendants' cut prices. If, on the other hand, the court meant that southern Illinois coal allowed its customary seasonal discount prices in the spring of 1954, then the court's statement is misleading if not so qualified.

6. In Finding of Fact No. 19, the trial court found that after the alleged price cuts on southern Illinois and western Kentucky coals that the defendants were, in effect, forced to reduce their price to $6.00 a ton (R. 31). If the defendants' $6.00 price was, in effect, a seasonal discount price to offset that of southern Illinois we can only sug-

gest that it was not instituted until the southern Illinois seasonal discounts had almost run their course. Moreover, if the defendants' $6.00 price represented a seasonal discount it was a very peculiar one because it ran completely through the summer season and until January 1, 1955, in the heart of the winter season.

7. In Finding of Fact No. 21 the trial court found that the "plaintiff from time to time made special price concessions below the Henryetta list price to certain of its customers" (R. 31). The insinuation here is that the plaintiff was guilty of price cutting, which is unsupported by the record.

8. In its Finding of Fact No. 22 the trial court emphasized that greater volume of production reduces the unit cost of coal (R. 31). The record conclusively shows that the efficiencies of greater production resulted in increased profit on steel coal, which was infinitestimal when compared to the enormous losses suffered by the defendants at their cut prices.

9. In Finding of Fact No. 23 the court found that in October, 1953, which was the month before the defendants' first price cut, the "defendants' volume of sales had declined below their efficient production capacity, their tracks were crowded with loaded but unsold cars of coal, they had few orders in prospect for November, and they were faced with shutdown of their mine" (R. 31). No comment is necessary here.

10. In Finding of Fact No. 24, the trial court found that the defendants' price cut on November 1, 1953, caused their volume of sales to improve substantially and they enjoyed substantial profits (R. 32). By reference to Appendices V and VI, it may readily be seen that the defend-

ant's volume of sales on domestic coal, instead of improving, decline and, whereas, in their fiscal year ending in 1953 before the price cuts they made a profit of $71,870.18 on 101,153.10 tons of domestic coal, or an average profit of 71 cents a ton, in the 11 months at cut prices in their fiscal year ending in 1954, they made a profit of $1,493.83 on 83,062.06 tons, or an average of profit of less than 2 cents a ton.

11. In Finding of Fact No. 27, the trial court found that "the defendants' profits increased over the full period of the reduced prices, both in total profits for all kinds of coal and the separate category of domestic coal" (R. 32). This finding is 100% erroneous. In the defendants' fiscal year ending September 30, 1955, immediately before their price cut their total profit was $191,928.77, of which $71,870.18 was profit on domestic coal (Appendix IV). On the other hand in their succeeding fiscal year ending September 30, 1954, 11 months of which were at cut prices their total profit was $153,328.17, of which $8,968.52 profit was made on domestic coal in the month of October 1953, which was the month immediately before the defendants' price cuts, while they made only $1,493.83 on domestic coal sold at the cut prices in the next 11 months (Appendix VI).

Finally, after their price cuts had been in effect for about a year, the defendants went into a retreating operation, which was not a normal mining operation, and the great savings in cost permitted the defendants to make a total profit in 10 months of $236,892.92, of which $43,895.37 profit was made on domestic coal (Appendix VII). The defendants might well argue that if their retreating operation resulted in great economy to them they should be permitted to take advantage of this fact. Our answer is that this did not justify them charging "retreating operation"

prices more than a year before their retreating operation began. In addition, it may be seen that even with the advantages of their retreating operation the defendants' total profits on domestic coal sold at cut prices over a 21-month period was $45,389.20 upon 173,427.31 tons (Appendices VI and VII), whereas in the 13 months immediately preceding the defendants' first price cut they sold 113,158.09 tons of domestic coal at a profit of $80,838.70 (Appendices V and VI).

12. In Finding of Fact No. 28, the trial court found that the defendants' price cuts were motivated by "business considerations, including shrinkage of the competitive market decline in the price of immediate competitors, pressure of their wholesale customers for reductions, plaintiff's special prices below its list price, desire and necessity to maintain existing volume of production, desire to recover and retain individual customers previously lost to competitors, and a desire to maintain and increase their profits" (R. 32); and in Finding of Fact No. 29 the trial court concluded that the defendants' price cuts were not motivated by any desire to injure the plaintiff (R 32). How can anyone restore a declining market by cutting prices if the ultimate retail price remains unchanged, as was true in the instant case? The retail price of Henryetta coal, as well as those of its competitors, remained unchanged throughout the defendants' price cutting campaign. The ultimate consumer of Henryetta coal never knew that any price cuts had ever taken place. If the defendants' price cuts were motivated by a well intention, by mistaken idea of the defendants' economic welfare, then if the defendants had been acting in good faith they would have quickly determined that the experiment was an economic failure and abandoned it. The evidence discloses that the defendants

kept very close track of their operations, and the defendant Berman stated that the items of receipt and expenditure were entered in the books of the defendants from day to day under the supervision of their accountant (R. 374), and he conceded that the defendants were able to ascertain their financial status from these accounts within a very short time. He further admitted that after the price cuts the defendants could determine within 2 months whether they were making or losing money (R. 395, 396).

As previously noted, the defendants in the first 11 months of their price cut made a meager profit of $1,493.8[illegible] on domestic coal, in comparison with the $71,870.18 profit thereon made in the prior fiscal year before the price cuts (Appendices V, VI).

The defendants had been told that Ben Hur was suffering devastating losses as a result of the price cuts and they were also aware that the third mine in the Henryetta field, the Atlas mine, had been driven completely out of business. They knew that their own profits on domestic coal had slumped to practically nothing. Since their price cuts were plainly against their economic self interest what other possible explanation can exist for their continued price cutting after knowledge of these facts than their designed intent to destroy Ben Hur as a competitor?

As of September 30, 1954, the defendants had been selling domestic coal at $6.00 a ton since June 1st, below their cost of production, as admitted by their own auditor. They certainly knew this at the close of that fiscal year, yet they continued their $6.00 price until January 1, 1955, when they increased it to $6.50 a ton. Petitioner asserts that they were compelled to do this due to the embarrassment caused to them by the fact that Ben Hur in November and

December, 1954, in the face of the defendants' lower price, had raised its price arbitrarily to $6.60 a ton and sold a substantial amount of coal.

13. In its Conclusion of Law No. 2, the trial court concluded that the defendants' cut prices "were not unreasonably low within the intent and meaning of * * * the Robinson-Patman Act." (R. 33) As noted above, the trial court found as a matter of fact that the defendants made more profit on domestic coal at their cut prices than they did prior to the price cuts complained of. This finding of fact is absolutely and completely erroneous under the undisputed evidence. Naturally, if the defendants' profits on domestic coal had increased as a result of their price cuts, we doubt if anyone would assert that such cut prices were reasonably low. The trial judge, however, was obviously laboring under a most serious misapprehension as to the crucial fact in the case. Having made this mistake of fact, he then concluded as a matter of law that the defendants' prices were not unreasonably low within the meaning of the Robinson-Patman Act.

The crux of this appeal is whether or not the trial court's finding that the defendants' price cuts greatly increased their profits on domestic coal in the teeth of the undisputed evidence which discloses that in their fiscal year before their price cuts on 101,153.10 tons of domestic coal the defendants made a profit of $71,870.18 (Appendix V), whereas in the 11 months after their price cuts upon 83,062.06 tons of domestic coal the defendants made merely $1,493.83, and in the face of this conclusion as a matter of law that the defendants' price cuts were not unreasonably low.

Petitioner asserts that under the facts of this case such prices were unreasonably low as a matter of law; that since

the defendants kept close track of their operations and undoubtedly knew that the price cuts were against their economic self interest, yet persisted in the course which they had adopted, proves beyond any reasonable doubt that their intention was not legitimate business competition, but a desire to secure a monopoly on the Henryetta coal field and destroy Ben Hur as their competitor. The latter conclusion is reinforced by the history of ill-will which the defendants bore Ben Hur beginning with the 1949 strike matter and terminating in the 120-acre lease matter which we have detailed above.

The Court of Appeals in Affirming This Case also Labored Under a Misconception of the Undisputed Facts.

During their fiscal year ending September 30, 1954, the defendants sold 54,521.74 tons of domestic coal at $6.50 a ton (less 50 cents a ton commission), upon which they made a profit of $7,922.21 from June 1 to September 30, 1954. In the same fiscal year they sold 27,736.29 tons of domestic coal at $6.00 a ton (less 50 cents a ton commission), upon which they sustained a loss of $6,244.80 (Appendix VI). Due to the fact that the defendants commenced a "retreating operation" which substantially reduced their expenses in November and December, 1954, they preferred to treat the entire period during which they sold domestic coal for $6.00 a ton (less 50 cents a ton commission) as a unit because the retreating operation enabled them to make considerable profit even at that price during the latter two months.

Schedule 3 of defendants' Exhibit S sets forth the defendants' operations at their $6.00 price for the 7 months from June 1 to December 31, 1954, when the same was in

effect. The schedule reflects that the defendants sold 77,707.20 tons of domestic coal on which they made a profit of $4,799.11, or an average profit per ton of 6 cents. Defendants' Exhibit S was not printed but a photostatic copy thereof is attached to the record in this cause. In brief, although the defendants sustained a loss of $6,244.80 during June-December, inclusive, because of their retreating operation in November or December, 1954, the loss which they incurred during the first months of that period when they were conducting normal mining operations was changed to a meager profit as a result of their retreating operation. In the face of this undisputed evidence the court below in its opinion stated:

> "The statement showed an increased profit on $6.00 oil-treated domestic coal over the $6.50 coal in the face of a diminished per ton profit realization (94¢ to 66¢) because of a volumetric decrease in unit cost."

The latter statement is absolutely erroneous.

Petitioner states that the law applicable to this situation is as follows:

In *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, 92 L. ed. 746, which was an anti-trust case, the order dismissing the case was reversed because of an erroneous finding of fact by the trial judge. In discussing its power to reverse in such a case the court held:

> "In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure is applicable. That rule prescribed that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the op-

portunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies, or by a jury, this court may reverse findings of fact by a trial court where 'clearly erroneous.' The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. *A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*" (Emphasis ours.)

In accord, see *Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corporation*, (9th Cir.) 178 F. 2d 541; *United States* v. *El-O-Pathic Pharmacy*, (9th Cir.) 192 F. 2d 62; *United States* v. *Guyer*, (4th Cir.) 218 F. 2d 266; *Gamewell Co.* v. *City of Phoenix*, (9th Cir.) 216 F. 2d 928.

We submit that if there was ever a situation within the coverage of the Robinson-Patman Act, it is the present case, and we cannot but feel that this Court has been left with the definite and firm conviction that a mistake has been committed. Moreover, it may readily be seen that the trial court's so-called findings of fact are really nothing of the sort, but instead represent mere conclusions predicated upon a complete misconception of the facts.

In *St. Louis Union Trust Co.* v. *Finnegan*, (8th Cir.) 197 F. 2d 565, it was held:

"* * * it is the duty of this court to reverse where the finding of fact made by the trial court is clearly erroneous, and a finding is clearly erroneous where it is not supported by the evidence, and is contrary to the evidence. The fact in dispute here is not an 'inferential fact' to be deduced from disputed facts. The facts here are undisputed and the inference that the sale was made by the corporation is a *non sequitur;* it is not a conclusion or inference which can be deduced from the proven fact; it is contrary to the evidence and is, therefore, 'clearly erroneous.' Further, it has been held that where the trial court's factual finding deals merely with conclusions from undisputed facts it is deprived of Rule 52(a) finality. *In re Kellett Aircraft Corp.*, 3 Cir., 186 F. 2d 197, 200. And see *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, 92 L. ed. 746; *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 339, 72 S. Ct. 690; *Gindorff* v. *Prince*, 2 Cir., 189 F. 2d 897."

In *Orvis* v. *Higgins*, (2d Cir.) 180 F. 2d 537, the rule applicable was aptly put as follows:

"Where a trial judge sits without a jury, the rule varies with the character of the evidence: (*a*) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (*b*) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. (*c*) But where the evidence supporting his finding as to any fact issue is entirely

oral testimony, we may disturb that finding only in the most unusual circumstances."

In accord, see *Dollar* v. *Land*, (C. C. A., D. C.) 184 F. 2d 245.

In *Maple Island Farm* v. *Bitterling*, (8th Cir.) 209 F. 2d 867, it was held:

"Findings of fact are 'clearly erroneous' within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., if they are against the clear weight of the evidence. *Kasper* v. *Baron*, 8 Cir., 1953, 207 F. 2d 744. *Aetna Life Ins. Co.* v. *Kepler*, 8 Cir., 116 F. 2d 1."

In *Sears Roebuck and Co.* v. *Johnson*, (3d Cir.) 219 F. 2d 590, referring to the Federal Rules of Civil Procedure the court held:

"But Rule 52(a) is not applicable where, as here, the dispute is not as to the basic facts, but as to what inference (*i. e.*, ultimate fact) should reasonably be derived from the basic facts. This court, by examining the basic facts found by the district court, can determine, as effectively as the district court can, whether or not an inference or likelihood of confusion is warranted."

A confession of violation of the antitrust laws is not generally obtained and intent to violate them may be inferred, as was held by this court in *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U. S. 600, 34 S. Ct. 951, 58 L. ed. 1490:

"But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually

done. and when, in this case, by concerted action the names of wholesalers who were reported as having made sales to consumers were priodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred."

See also *Loew's, Inc.*, v. *Cinema Amusements*, (10th Cir.) 210 F. 2d 86.

Petitioner asserts that the defendants in this cause used the tremendous profits which they made upon steel coal as a war chest by means of which they were unable to conduct economic warfare against Ben Hur in the domestic coal field, which was the only place where the parties competed. Ben Hur, of course, had no lucrative steel contract.

This Court previously reversed the Court of Appeals for the Tenth Circuit in connection with the Robinson-Patman Act. In *Moore* v. *Mead Service Co.*, (10th Cir.) 184 F. 2d 338, followed by a memorandum opinion of this Court, 340 U. S. 944, 71 S. Ct. 528, 95 L. ed. 681; the latter remanded the cause to the court below to reconsider its previous opinion, which it did in 190 F. 2d 540. Upon a second trial of the cause the court below rendered a further opinion setting aside the judgment in favor of the plaintiff in the trial court, 208 F. 2d 777. The court below was then reversed a second time by this Court in *Moore* v. *Mead's Fine Bread Co.*, 348 U. S 115, 75 S. Ct. 148, 99 L. ed 145. In the *Moore* case this Court will recall that the plaintiff, a local baker in Santa Rosa, entered into an agreement with his retailers, which had the effect of instituting a boycott in Santa Rosa against the defendant corporation which sold bread in several states. The defendant broke the boycott by reducng the price of bread from 14 to 7 cents a loaf, and drove the plaintiff out of business. This

Court noted that "this type of price cutting was held to be 'foreign to any legitimate commercial competition' even prior to the Robinson-Patman Act." See *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, (C. A. 2d, N. Y.) 30 F. 2d 234, 237. This Court further noted:

> "The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price cutting campaigns."

The *Moore* case is directly analogous to the case at bar, although the court below gave lip service to the principles announced in that case it, in effect, refused to follow it.

The fact that the defendants knowingly sold coal below their cost of production cannot be denied. They continued to do so until their "retreating operation," which was an abnormal mining procedure and reduced their expense to the point where they were enabled to make a profit even at their cut prices. This retreating operation did not occur, however, until a year after the defendants had commenced their illegal price cutting campaign, and certainly serves as no defense to the illegal activities which they undertook prior to gaining that considerable economic advantage.

In an analogous case of *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U. S. 555, 51 S. Ct. 248, 75 L. ed. 544, it appeared that the plaintiff parchment manufacturer produced better parchment at cheaper prices than its three competitors. The latter, in violation of the Clayton Act, pursuant to a conspiracy "sold their goods below the point of fair profit and finally below the cost of production," and

drove the plaintiff out of business. This Court in affirming the judgment of the trial court in favor of the plaintiff noted that it might consider as an element of damage the difference between the price which the plaintiff was compelled to sell his products due to the illegal price cutting competition of the defendants, and what he could have sold them for had such illegal price cutting not taken place. Predicated upon this test, the measure of damages suffered by Ben Hur is $90,180.78 (R. 172), and Ben Hur should have recovered against the defendants for three times that amount plus a reasonable attorney's fee.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX 1.

(Filed: United States Court of Appeals, Tenth Circuit, Feb. 13, 1957; Robert B. Cartwright, Clerk.)

UNITED STATES COURT OF APPEALS,
Tenth Circuit.
January Term - 1957.

No. 5413

Ben Hur Coal Company, a corporation, Appellant,
vs.
Earl Wells and M. A. Berman, co-partners doing business as Starr Coal Company, Appellees.

Appeal from the United States District Court for the Eastern District of Oklahoma.

G. C. Spillers, Jr., (G. C. Spillers was with him on the brief) for Appellant.

Richard B. McDermott (Bradford J. Williams, Fenelon Boesche, T. Hillas Eskridge and Franklin D. Hettinger were with him on the brief) for Appellees.

Before BRATTON, Chief Judge, and MURRAH and LEWIS, Circuit Judges.

[OPINION.]

MURRAH, Circuit Judge.

This is an appeal from a judgment denying recovery of triple damages under Section 15, Title 15 USC, for losses incurred by the appellant in competition with appellees' coal sales. Such sales are said to have been made at "unreasonably low" prices "for the purpose of destroying competition or eliminating a competitor" within the meaning of the latter part of Section 3 of the Robinson-Patman Act. Section 13a, Title 15 USC.

The appellant, a family corporation owned by Ellis, Gene and Amy Taylor, and the appellees have been com-

peting producers of domestic coal in Henryetta, Oklahoma, for a great number of years. Although there have been various price levels in the preceding years, Henryetta domestic stoker coal was selling for $7.35 per ton on November 1, 1953, at which time the appellees reduced their price to all customers to $6.50 per ton f. o. b. Henryetta, and subsequently on June 1, 1954, to $6.00 per ton. To maintain its competitive market, the appellant also reduced its prices, but excessive losses compelled it to increase its price in the latter part of 1954 over that of the appellees. Such reductions, says the appellant, were the culmination of a growing animosity between the parties and were made solely for the purpose of destroying the appellant as a competitor.

Upon a trial of the case to the court without a jury, the court found that in making the two price reductions, the defendants were motivated by business considerations, including shrinkage of the competitive market; decline in the prices of immediate competitors; pressure of their wholesale customers; appellant's covert discounts below its published price; desire to maintain existing volume, recover and retain individual customers, and maintain and increase their profit. The court specifically found that the price reductions complained of were not motivated by malice or by an intent to injure or destroy competition of the appellant; that the accused prices of the appellees were not low in relation to competitive prices for like products but were always higher than comparable coal from competing mines. It was on these findings that the trial court dismissed the cause of action and entered judgment for the appellees.

There is no question of federal jurisdiction founded in the antitrust law. The sole and only question is whether the findings of the court are without support in the record, hence clearly erroneous. Appellant earnestly contends that they are utterly without factual foundation.

It may be noteworthy to observe at the outset that we do not have the problem of price discrimination to con-

peting buyers under Section 2(b) of the Robinson-Patman Act (Sec. 13(b), Title 15 USC) as in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231; or discriminatory sales for the purpose of eliminating competition under Section 3 as in *Mead's Fine Bread Co.* v. *Moore*, 208 F. 2d 777, rev. 348 U. S. 115, reh. den. 348 U. S. 932. And so, we have no occasion to indulge in the contrariety of views concerning whether good faith reduction to meet an equally low price of a competitor must be uniform. See "Report of the Attorney General's National Committee to Study the Antitrust Laws," March 31, 1955, pp. 179-186; "Report of the Select Committee on Small Business," H. R. 2966, 84th Cong., 2d Sess., pp. 256-277. We have here only the question of whether uniform price reductions violated the unreasonably low price provisions of Section 3 of the Robinson-Patman Act. And, to recover under this provision of Section 3, prices must not only be unreasonably low, but they must also have been established with the design and purpose to destroy competition. *Balian Ice Cream Co.* v. *Arden Farms Co.*, 104 F Supp. 796, 800, aff'd, 231 F. 2d 356, cert. den., 350 U. S. 9[illegible]; reh. den., 351 U. S. 928; *F. & A. Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180.

The basic facts are that Henryetta domestic stoker coal, with an established reputation for premium quality, is sold through wholesalers f. o. b. Henryetta to consumer markets in Kansas, Missouri, Nebraska, Iowa, South Dakota and Minnesota in competition with coal of comparable grade and quality from Catoosa, Oklahoma, southern Illinois and western Kentucky. It seems agreed, however, that the Henryetta coal has always enjoyed a premium price over other coals by reason of consumer preference.

There was an abundance of evidence on behalf of the appellant to the effect that the reduction in price of Henryetta coal on November 1 was "unusual" due to the fact that coal dealers had already contracted for their supply at the higher price, and that the reduction at or just before the peak of the season prompted some of the dealers

to demand a price revision. There was also credible testimony to the effect that the reduction of the price of the coal did not stimulate sales, and that there would have been as much Henryetta coal sold at $7.35 per ton as $6.50, or even $6.00; and that in fact the reduced prices were not passed on to the consumer but were pocketed by the retailers. Indeed, there was testimony to the effect that the Henryetta operators could not profitably produce coal at $6.50 per ton and that the price reductions complained of eliminated one competitor and ruined the appellant; that the appellees lost money and were able to survive only with the support of large profitable sales of industrial coal. Specifically there was accounting evidence from which the appellant persuasively argues that according to the appellees' own methods of accounting, they realized 71¢ average profit per ton on $7.35 domestic coal in the fiscal year ending September 30, 1953, and only 11¢ per ton on comparable tonnage for the fiscal year ending September 30, 1954, including approximately $9,000.00 profit made in October 1953 before the November 1st price reduction. The appellees raised the price of their coal from $6.00 to $6.50 on January 1, 1955. And, appellant introduced testimony to the effect that during the latter part of 1954 and most of 1955, the appellees were engaged in what they called "retreating operations" during which they avoided expensive development work, thereby enabling them to show a fanciful profit.

These facts are portrayed against a hostile background commencing in 1949 when appellant broke a stalemate in a strike between the Coal Operators Association and the Miners Union by signing a contract with the Union against the advice of appellee, Wells, who was representing the Association in the labor dispute. Another event alluded to as indicative of animosity was the option secured by the appellant to lease 120 acres of valuable coal land upon the expiration of appellees' lease. When the lease was inadvertently allowed to expire without renewal, it was taken by the appellant, leaving appellees almost without additional productive coal land. Another straw in the wind

were statements by Wells to the effect that if Manager Ellis Taylor did not cease cutting his price and splitting commissions with his jobbers, he would cut his price. And, finally came the conference between Gene Taylor and Wells, after the price reductions, when Taylor prevailed upon Wells to restore the price in order to spare appellant's business. Wells is said to have replied that he was sorry for Gene and his mother but he "was forced to teach him [Ellis Taylor] a lesson."

The appellees developed their case against a background of a constantly diminishing demand for both consumer and industrial coal due to the encroaching natural gas and fuel oil supplies. It was shown that in the ten years preceding the trial of the case, the national domestic market for coal declined over 51 percent, and that in the last five years, Oklahoma domestic coal tonnage dropped 84 percent; that during the same period, the number of producing coal mines in Oklahoma decreased from 95 to 61; that in 1920 there were 36 producing underground Henryetta coal mines, and at the date of the trial, there were only 3—the appellant and appellees. It was in this context of overpricing, in a dwindling and competitive market, that the appellees say they reduced their prices of domestic coal in order to increase their volume and decrease the unit cost.

The basic and material difference in the loss on oil-treated domestic coal sales shown by appellant's audit of appellees' accounting records and the profit shown by appellees' audit lies in the accounting methods employed to arrive at divergent results.

In determining appellees' profit or loss on oil-treated domestic stoker coal the appellant first assumed that the two competing mining operations were sufficiently similar for cost accounting purposes. Using its own operation as a criterion, it proceeded to determine the cost of producing oil-treated domestic stoker coal separate and apart from any other line. It charged against this line additional

labor, machine and oiling expenses and also the constant loss on slack or fine coal.

In computing their profit or loss, the appellees employed the accounting methods and practices used in the regular course of their business, said to be customary in the coal producing industry. Under this method of accounting all production costs, fixed and variable, are lumped against the total sales to determine unit cost of production. And, profit or loss on different grades and qualities is determined by the difference between the unit cost of production and the respective sales prices. The only exception recognized by the appellees is to take the costs of oil treating and advertising out of the general cost of production and charge it directly to oil-treated stoker coal. Appellees concede the additional labor and machinery costs in the production of oil-treated domestic coal but take the position that the amount is negligible and indeterminable.

Employing this method of accounting, and based on their own accounting records, the appellees produced a profit and loss statement for the fiscal year ending September 30, 1954, showing a net profit of approximately $153,000 on total coal sales of approximately 231,000 tons, or approximately 66¢ per ton. During this period industrial coal sold for $5.95 per ton and oil-treated domestic coal sold at $7.35, $6.50 and $6.00. Breaking it down into categories of industrial coal and the various grades of domestic coal, the statement showed a net profit of $1.05 per ton on industrial coal; 79¢ per ton on 57,000 tons of oil-treated domestic coal; and a profit of 11¢ per ton on a total of 95,000 tons of all grades of domestic coal, including a $2.00 loss per ton on the slack or fine coal—always sold at a loss.

Using the same method of cost accounting, but relating it to the different pricing periods under consideration, it was shown that for the seven months ending May 31, 1954, while oil-treated domestic coal was selling for $6.50 per ton, appellees realized a net profit of 74¢ per ton on total sales of 131,000 tons; a profit of 94¢ per ton on 32,000 tons

of oil-treated domestic coal; and total domestic profit of 22¢ per ton on 54,000 tons. For the seven months ending December 31, 1954, during which oil-treated domestic coal sold for $6.00 per ton, the appellees realized a net profit of 68¢ per ton on a total of 58,000 tons; 66¢ per ton on 48,000 tons of oil-treated domestic coal; and 6¢ per ton on a total of 77,000 tons of all grades of domestic coal. For the four months ending April 30, 1955, during which oil-treated domestic coal sold for $6.50 per ton, appellees realized a net profit of $1.27 per ton on a total of 85,000 tons; $1.44 per ton on 22,000 tons of oil-treated domestic coal; and 73¢ per ton on a total of 36,000 tons of all grades of domestic coal. The statement showed an increased profit on $6.00 oil-treated domestic coal over the $6.50 coal in the face of a diminished per ton profit realization (94¢ to 66¢) because of a volumetric decrease in unit cost. To reflect the increase in sales of $6.00, domestic coal over their sales at higher prices, the appellees produced a comparison of the $6.00 coal sales period with identical months in the previous year. The result showed a total increase of 20 percent of all domestic coal and a 25 percent increase in the oil-treated stoker.

To show the "how and why" for the increased profits based upon the volumetric decrease in unit cost, the appellees produced graphic illustrations of the ratio of unit cost to selling price as related to volume of production. Taking its fixed market of industrial coal of 132,000 tons per fiscal year at a fixed selling price of $5.95, it was shown that it was necessary to produce only 6000 tons of domestic coal at $5.50 net, or a total of 138,000 tons of coal at established selling prcies, in order to reach the "break-even point." From that point appellees plotted the curves of unit cost and average selling price in relation to tonnage production to a point where their fiscal 1954 total output of 231,000 tons cost $4.90 per ton, which when sold at an average selling price of $5.40 per ton yielded a net profit of approximately 50¢ per ton. Basically, this cost analysis was based upon actual selling prices, production costs and tonnage,

and is in conformity with their accounting records The discrepancy, however, between this reflected profit and the 66¢ per ton reflected in the audit is explained by an understatement of the industrial production tonnage and an overstatement of some operational costs. In other words, the graph was on the "conservative side." In any event, the appellees' accounting records show an overall profit which the appellant cannot gainsay. And, there was testimony to the effect that if this production and pricing pattern were applicable to the appellant's operation, it would result in a profitable enterprise.

The appellant, however, challenges this method of cost accounting as a wholly unrealistic and unreasonable method of determining whether the appellees sold domestic coal at unreasonably low prices. In effect it says that profit and loss must be determined by the unit cost of domestic coal standing alone; that acceptance of the method of accounting employed by the appellees would allow them to use the profits from industrial coal sales as a war chest to destroy competition and to eliminate the appellant as a competitor by selling his domestic coal at a loss.

We do not suppose that the appellees could use their profits from one line to sustain their business while selling another line at a loss to eliminate a competitor with any less impunity than they could discriminate with respect to prices of merchandise of the same grade and quality to different customers for the same purpose. Cf. *Mead's Fine Bread Co.* v. *Moore, supra.* Furthermore, it would ignore the economic facts of life to say that one in business for a profit would deliberately and consistently sell at a loss without some ulterior motive. It would be equally inadmissible to say that one who consistently sells at a loss without competitive compulsion is not selling at unreasonably low prices. And, one who consistently sells at unreasonably low prices is vulnerable to the inference that he is doing so for the proscribed purpose of destroying competition or eliminating a competitor.

We cannot say, however, that a pricing policy based upon sound economics is inadmissible simply because it may result in the destruction of a competitor; for it is not within the scope or purpose of the antitrust laws to protect a business against loss in a competitive market. *Balian Ice Cream Co.* v. *Arden Farms, supra,* at p. 801. One who reduces his prices in defense of his economic life cannot be guilty of eliminating competition or his competitors. If, as the trial court held, the price reductions on domestic coal were made to increase volume and decrease unit cost in order to retain its proportionate share of a diminishing market, the appellees were certainly within the law. In the final analysis, the question resolves itself into one of intent and purpose, not a choice of accounting methods. The trial court has absolved the appellees of any guilty intent and we cannot say that its findings and conclusions in that respect are clearly erroneous. The judgment is affirmed.

APPENDIX II.

A HISTORY OF THE PROFITS AND LOSSES OF THE PLAINTIFF BEFORE AND AFTER THE PRICE CUTS.

The profits of the plaintiff for its fiscal years ending May 31st, from 1943 to 1955, are contained in Plaintiff's Exhibit 3 (R. 495). This exhibit reflects the profits and losses of the plaintiff as stated for income tax purposes. Since, however, the plaintiff is a family corporation and its officers are the owners thereof, although their salaries are treated for income tax purposes as expense items, it was recognized for direct comparison between the profits and losses of the plaintiff and the defendants that the plaintiff's officers' salaries should be considered as income rather than expense items, and that the defendant partners' salaries should likewise be considered as a profit to them. Counsel for defendants agreed that this was so (R. 193). It was also recognized that the mineral depletion allowance in the production of coal which is considered expense for income tax

purposes is actually a profit and was so treated by the parties to this action in their respective accountings.

The following figures represent the profit of the plaintiff corporation for the years indicated, predicated upon the above method of computation:

Fiscal year ending May 31		Profit
Before price cuts		
1943		$ 74,983.67
1944		10,581.93
1945		868.29
1946		32,839.94
1947		88,825.36
1948		18,454.46
1949		73,369.09
1950		69,968.56
1951		2,499.53
1952	loss	16,235.70
1953		17,725.94
After price cuts		
1954	loss	17,089.22
1955	loss	46,979.68

It will be noted that before the price cuts that the plaintiff corporation operated at a loss in only one year, that of 1952. This, however, was due to an unusual circumstance. In that year the corporation purchased a mining machine termed a "coal mole" for $32,833.39. This machine proved absolutely unsuitable for the plaintiff's mining operation, with the result that it was junked as a complete loss (R. 166). Consequently, if this had not occurred, instead of showing a loss for 1952 the plaintiff would have had a profit of $16,597.69 instead.

APPENDIX III.

A COMPARISON OF THE PROFITS UPON DOMESTIC AND STEEL COAL.

In order for the Court to fully appreciate the enormous profits enjoyed by the defendants from their sale of steel coal the situation may be explained as follows: In the process of removing four tons of domestic coal from the seam and crushing it in the tipple, one ton of powdered coal termed "Slack," "Fines," or "Bug Dust" is invariably produced. Although this was undisputed, the trial judge declined to so find (R. 7). Hereafter when we refer to a specific tonnage of domestic coal, unless we otherwise indicate, it is to be understood that such refers not only to the domestic coal itself but the "bug dust" attributable thereto. For long prior to the price cuts and at all times thereafter until the trial of this case "bug dust" was sold for $2.85 a ton, which was below its cost of production, in order to realize something from it rather than throw it away. Meanwhile, the other three tons of domestic coal so produced were sold for $7.35 a ton, less 50 cents a ton commission, with the result that from the four tons the mine operator received $23.60. The trial court refused to make this finding, although such was undisputed (R. 40).

On the other hand, steel coal, which is otherwise known as "run of the mine" coal, after coming out of the mine and reduced to a certain maximum size by a crusher, is sold "bug dust" and all, for $5.95 a ton, without the payment of any commission whatsoever. The price of $5.95 a ton for steel coal had been in effect for a long time prior to the price cuts complained of and continued thereafter until the trial of this case. The result of this is that the defendants received $23.80 for four tons of steel coal. When the defendants reduced their price from $7.35 a ton to $6.50 a ton their dollar realization for four tons of domestic coal was reduced to $21.05. When they cut their price to $6.00 a ton in like manner it was reduced to $19.55.

Moreover, the undisputed evidence discloses that due to the fact that domestic coal must be subjected to processes and treatment over and above that accorded steel coal, it is more expensive per ton to produce, and, hence, the profit on domestic coal is less than that had for steel coal, even though the mine operator received the same price for each.

APPENDIX IV.

A COMPARISON OF THE PRICES OF HENRYETTA, SOUTHERN ILLINOIS, AND CATOOSA DOMESTIC COALS.

Before Defendants' price cuts.

Date		Henryetta	Southern Illinois	Catoosa
1951	Feb.	6.75	6.05	5.75
	Mar.		6.25	
	April			5.50
1952	Oct.	7.35		
	Nov.		6.55	
	Dec.			5.85
1953	Mar.		6.30*	

After Defendants' price cuts.

1953	Nov.	6.50		
1954	June	6.00		
	July			5.25
	Nov.			5.50
1955	Jan.	6.50		5.75
	May	6.00		5.25
	Sept.	6.50	6.30	5.75

(*R. 434.)

Domestic stoker coal is generally oil treated which costs extra. The above figures represent the prices of the respective domestic coals oil treated.

APPENDIX V.

DEFENDANTS' OPERATIONS FOR THEIR FISCAL YEAR ENDING SEPTEMBER 30, 1953, ACCORDING TO THEIR METHOD OF CALCULATING PROFITS AND LOSSES.

(Basic data is derived from Plaintiff's Exhibits 8 and 10 (R. 505, 509).)

Recapitulation	Tonnage	Profit	Average Profit per ton
Domestic	101,153.10	$ 71,870.18	$0.7105
Steel	115,485.70	$120,058.59	$1.0395
Total	216,638.80	$191,928.77	

Computation			
Total income			$1,311,646.96
Less: profit sale of assets		259.90	
miscellaneous income		2,727.02	
sales commissions		40,273.83	43,260.75
		Net sales	1,268,386.21
Expenses			$1,215,735.08
Less: sales commissions		40,273.83	
advertising		1,500.35	
*spray oil		14,160.22	
depletion		96,016.89	151,951.29
Expense chargeable to all coal			$1,063,783.79

Hence:

Total expense chargeable equally to all coal, $1,063,783.79, divided by the total tonnage 216,-638.80, equals $4.910403, as the average cost per ton of steel coal.

Average sales price steel coal	$5.950000
Average cost per ton	$4.910403
Average profit per ton steel coal	$1.039597

Total steel tonnage, 115,485.7, times average profit per ton, $1.039597, equals $120,058.59, as the total profit from steel coal.

Total profit for year, $191,928.77, less profit of steel coal, $120,058.59, leaves $71,870.18, as the total profit from domestic coal.

The profit of domestic coal, $71,870.18, divided by its tonnage, 101,153.10, discloses that the average profit per ton on domestic coal was $0.71050892.

*Plaintiff's Exhibit 8 discloses that the combined cost of spray, and lubricating oils was $16,857.41, hence we must estimate the cost of spray oil alone. In defendants' fiscal year of 1954, spray oil was 84% of the combined total of these two oils (Schedule 1-a, Defendants' Exhibit S). Applying 84% to the $16,857.41 we arrive at $14,160.22, which we have used above. This estimate must be very close to the actual figure.

APPENDIX VI.

DEFENDANTS' OPERATIONS FOR THEIR FISCAL YEAR ENDING SEPTEMBER 30, 1954, ACCORDING TO THEIR METHOD OF CALCULATING PROFITS AND LOSSES.

Recapitulation	Tonnage	Total Profit	Profit per ton
Domestic			
(October only)	12,004.99	$ 8,968.52	$0.7471
(11 mos. at cut prices)	83,062.06	$ 1,493.83	$0.0179
Total domestic	95,067.05	$ 10,462.35	$0.1100
Steel	136,505.50	$143,858.29	$1.0538
Total	231,572.55	$153,328.17	

Profits and losses upon domestic coal. The sales prices indicate the net price per ton received by defendants *after*

payment, or *without* payment, of commissions. Figures with asterisks represent losses.

Sales price	Tonnage		Total Profit	
	(October only, before price cuts)			
$7.35	242.13		$ 277.36	
6.85	10,120.35		7,844.01	
6.50	1,642.51	12,004.99	847.15	$8,968.52
	(Nov. 1, 1953, to Sept. 30, 1954, after price cuts)			
6.00	54,521.74		7,922.21	
5.90	109.97		7.82	
5.75	57.03		2.27*	
5.65	60.61		6.92*	
5.50	27,736.29		6,244.80*	
5.40	523.90		156.76*	
5.15	52.52	83,062.06	25.45*	$ 1,493.83
	Total	95,067.05		$10,462.35

Computation Sales

Price	Tonnage	Costs	Sales	Adjusted Sales	Profits
7.35	242.13	1,219.42	1,496.00	1,496.78	277.36
6.85	10,120.35	50,968.46	58,860.22	58,812.47	7,844.01
6.50	1,642.51	8,272.07	9,126.63	9,119.22	847.15
6.00	54,521.74	274,584.21	282,736.17	282,506.53	7,922.21
5.90	109.97	553.83	562.11	561.65	7.82
5.75	57.03	287.22	285.18	284.95	2.27*
5.65	60.61	305.25	298.57	298.32	6.92*
5.50	27,736.29	139,686.49	133,550.16	133,441.69	6,244.80*
5.40	523.90	2,638.48	2,482.74	2,481.72	156.76*
5.15	52.52	264.50	239.3[illegible]	239.05	25.45*
Total	95,067.05	$478,780.03	$489,840.03	$489,242.23 *losses	$ 10,462.35

Explanation of Foregoing Computation: The tonnages stated at the various prices above are derived from the sixth line from the bottom of Plaintiff's Exhibit 7 (R. 503). However, since there was a difference of 4.5 tons between the total domestic tonnage as computed by plain-

tiff and as computed by defendants, the tonnages stated in Plaintiff's Exhibit 7 were adjusted proportionately to make them coincide with defendants' view of the total domestic tonnage. The other basic data for the computation is derived from Schedule 1 of Defendants' Exhibit S (three copies filed with printed record). Each tonnage stated represents the combined tonnage of domestic coal sold plus its proportionate share of "bug dust." When the total purchase price received by defendants for each sales price was computed, and the total added it was found that the total monies received for all domestic coal sales (and "bug dust") was $489,640.08, whereas the correct figure was $489,242.38. This represents an error of $397.70, probably resulting from the fact that the defendants had made adjustments in their sales prices after the original sales. This error of $397.70 was then distributed proportionately over all the domestic coal with the results stated in the column marked "Adjusted sales." The latter figures were used in determining profits and losses.

APPENDIX VII.

DEFENDANTS' OPERATIONS FOR THEIR FISCAL YEAR ENDING SEPTEMBER 30, 1955, (first ten months), ACCORDING TO THEIR METHOD OF CALCULATING PROFITS AND LOSSES.

(Basic data is derived from Schedule 1 of Defendants' Exhibit T, three copies filed with printed record.)

Recapitulation

	Tonnage	Profit	per ton
Domestic	90,365.25	$ 43,895.37	$0.4857
Steel	121,777.50	192,997.55	$1.5848
Total	212,142.75	$236,892.92	

Computation

Total income			$1,174,297.21
Total expense			937,404.29
Less:	Spray oil	$10,515.20	
	Advertising	851.50	11,366.70
Expense chargeable to all coal			$926,037.59

Hence:

Total expense chargeable to all coal, $926,037.59, divided by the total tonnage, 212,142.75, equals $4.3651625, as the average cost per ton of steel coal.

Average sales price steel coal	5.9500000
Average cost per ton	4.3651625
Average profit per ton steel coal	$1.5848375

Total steel tonnage, 121,777.5, times average profit per ton, $1.5848375, equals $192,997.55, as the total profit from steel coal.

Total profit for year, $236,892.92, less profit of steel coal, $192,997.55, leaves $43,895.37 as the total profit from domestic coal.

The profit of domestic coal, $43,895.37, divided by its tonnage 90,365.25, discloses that the average profit per ton on domestic coal was $0.485754.

APPENDIX VIII.

A COMPARISON OF THE DEFENDANTS' TOTA COAL PRODUCTION FOR THE MONTHS JULY TO OCTOBER, INC., OF 1952 AND 1953.

The following figures are derived from Plantiff's E hibit 10, and are undisputed (R. 509):

	1952	1953
July	4,870.75	12,167.25
August	14,915.60	19,644.05
September	21,131.45	25,004.50
October	19,894.00	23,067.97
Total	60,811.80	79,883.77

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1956.

No. 970

BEN HUR COAL COMPANY, a Corporation, *Petitioner*,
vs.
EARL WELLS and M. A. BERMAN, Co-Partners, doing business as STARR COAL COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

In opposition to the petition, respondents respectfully pray that review be denied to petitioner. Their brief in opposition follows.

Opinions Below.

The cause was tried to the United States District Court for the Eastern District of Oklahoma. This Court filed no written opinion, but entered detailed Findings of Fact which may be found at pages 27 to 33 of the printed portion of the transcript filed with the petition, and are reprinted in an Appendix to this brief.

The opinion of the Court of Appeals, affirming the trial court, is published at 242 F. 2d 481 (Adv. May 13, 1957) and is appended at length to the petition as its Appendix 1 beginning at page 37 thereof.

Jurisdiction.

The judgment of the Court of Appeals to which the petition is addressed was entered on February 13, 1957, and the petition for certiorari was filed on May 3, 1957. The

jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1).

Jurisdiction of the subject matter by the courts of the United States is claimed under Title 28, U. S. C., Section 1331, for that the claim of the plaintiff and petitioner arises under the Federal statutes hereinafter quoted, and involves the requisite sum or value. Except as the claim is actionable under the statutes relied upon, jurisdiction of the Federal courts does not exist. Diversity of citizenship is lacking, all parties being citizens and residents of Oklahoma.

Questions Presented.

The true and single question which will be presented upon a review of the judgment below is the sufficiency of the evidence to sustain detailed Findings of Fact entered by the trial court and affirmed by the Court of Appeals.

No question of law will occur unless and until the case has been retried upon the facts and opposite findings have been made.

The petitioner lost its case in the trial court upon the general issue of the truth of its complaint. The trial court found its accusation to be untrue. After a detailed examination of the evidentiary record, the Court of Appeals affirmed without dissent. Petitioner's statement of the questions presented for review discloses that its real objective is to obtain a retrial of the facts, and indeed its cause may not succeed otherwise. In an attempt to state the factual issue in the posture of a question of law, petitioner has employed the terms "undisputed" and "overwhelming" to the point of recklessness. None of the significant issues of fact was undisputed, and contrary representation is totally unwarranted upon this record.

The suggestion that the opinion of this Court in *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115, was ignored by the Court of Appeals is not true. The case was noted, cited and distinguished in the court's opinion (Appendix I to the petition, page 39). The rule of this decision simply has no application to the facts found in the case at bar.

Statutes Involved.

The statutes invoked by petitioner's action are Section 3 of the Act approved June 19, 1936, commonly called the Robinson-Patman Act (49 Stat. 1526; Title 15, U. S. C., Section 13 a) and Section 4 of the Act approved October 15, 1914, commonly called the Clayton Act (38 Stat. 730; Title 15, U. S. C., Section 15).

The two statutes are correctly reproduced at pages 3 and 4 of the petition. The particular charge of petitioner's complaint invokes only that portion of Title 15, U. S. C., Sec. 13a, which deals with "unreasonably low" prices. For the purposes of this action, therefore, the section may be read as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

Treble damages for alleged violation of the quoted provision are claimed under Section 4 of the Clayton Act (Title 15, U. S. C., Section 15).

Statement of the Case.

Petitioner and respondent were competitors in mining and marketing coal produced from mines at Henryetta, Oklahoma. Their commerce was interstate in character.

Their markets for coal of domestic sizes were principally in Nebraska and Iowa. In this market their products met the competition of other coal produced in Oklahoma, and the coal products of Illinois, Western Kentucky, Missouri, Kansas, Colorado, and Wyoming. The number of individual competitors in this market was myriad.

Henryetta coal was at freight disadvantage in its competition with the product of Illinois, Western Kentucky, Missouri, Kansas and even other coal produced in Oklahoma. It also carried the highest mine price of any of its competitors, both before and after the price reductions which were the basis of petitioner's claim below. The product of the parties was of high quality, but of no better quality than the coal of Southern Illinois, Western Kentucky, and Catoosa, Oklahoma, all of which were lower in price, and deliverable to the market at lower freight tariffs.

Respondents reduced their mine price for coal of domestic sizes in November of 1953 from $7.35 per ton to $6.50 per ton. After this reduction respondents' prices at their mine were still higher than the mine prices of their competitors at Catoosa, in Southern Illinois, and Western Kentucky. The reduced price did not even approach the levels at which the coals of Kansas and Missouri were selling, but the latter were inferior in quality. In June of 1954 respondents again reduced their mine prices, this time to $6.00 per ton. The second reduction occurred after a similar and earlier break in the price by the mines of Southern Illinois, and respondents' price was still the highest in their competitive group. In December of 1954 respondents' price was raised to $6.50 per ton, until May 1 1955, when it returned to $6.00 in response to seasonal reductions by its competitors.

None of the accused prices of the respondents were ever "low" in relation to the prices of their chief competitors from Southern Illinois and Western Kentucky. The trial court made a specific finding upon the point. (See Finding 30 in Appendix.)

More than this, respondents' reductions in their prices did not anticipate the market trend, but only followed prior reductions by their competitors. (See Findings 16, 17 and 18 in the Appendix.)

In its action below, petitioner charged that the accused price reductions resulted in sales by the respondents below their cost of production, and this contention was the basis of the claim that the prices were "unreasonably low." But petitioner failed in its proof of this contention as well as others. Petitioner finally abandoned effort to show that price of $6.50 per ton was unprofitable, for the evidence showed it to be richly profitable to respondents, and even to be profitable to petitioner itself. Ben Hur's attack thus was focused upon the $6.00 price which was in force for a period of seven (7) months in 1954, and for a brief period in the summer of 1955. Petitioner approached its problem by a departure from conventional accounting of the industry whereby costs were attempted to be shifted between products of the total enterprise to enhance cost figures related to coal of domestic sizes, and to attribute admitted profits of the enterprise almost totally to activities in an industrial market. The accounting theories so proposed were unknown to industry practice and were challenged by detailed testimony given by expert accountants of the highest professional qualifications. The trial court rejected the accounting theories of petitioner, and held that it had not carried the burden of proving that respondents sold coal below their cost of production (see

Finding 5 in the Appendix). It is noteworthy that even if petitioner's accounting suggestions had been acceptable, their result would have been to show only a trifling loss in one short period of respondents' operations at the $6.00 mine price. On the other hand respondents' accounts, authenticated by the opinions of outstanding representatives of the accounting profession, showed the $6.00 price to be productive of rich profits over the period during which the price remained in force. Without attempting to detail the full circumstances which demonstrate the truth of this conclusion, the evidence dealt with the effect of volumes responsive to the lower price upon unit costs, and the consequent enhancement of total profits of the enterprise.

In the opinion of the Court of Appeals the case turned upon yet another issue of fact which defeated the petitioner before the complexities of cost accounting were reached. This was the issue of motivation of respondents in making the accused price reductions. Petitioner asserted that respondents reduced their price out of malice or spite toward the petitioner. It developed its case circumstantially and proposed malice as the only acceptable inference of incidents of friction between the parties, together with an occurrence of loss to the respondents arising from lapse of a coal lease to which petitioner succeeded in title. All of these circumstances were met directly with denial or explanation in terms other than resulting malice.

On the other side of the evidence, respondents said that their price reductions were prompted by economic considerations related to the lawful successful conduct of their business. Among these were a sharply diminishing market for domestic coal,—a declining price structure in the overall market,—reductions in mine price by their immediate competitors,—sharply declining volume of respondents

sales,—a glut of unsold and unmoved coal at respondents' mine immediately before the first reduction,—demands by respondents' wholesale customers for a reduction in price to competitive levels,—and a belief by the respondents that reduced prices would result in improved volume, reduced unit costs, and enhanced profits. A further consideration was a practice of petitioner itself to grant covert discounts from its published prices to specially favored customers, which were shown to have intruded upon the competition between the parties in the domestic market. All of these circumstances were shown by detailed testimony of many witnesses, whose evidence would require detailed examination and careful evaluation in a review by this Court. This evidence was acceptable to the trial court, and was the basis of Findings 28 and 29, reflected in the Appendix. Here the trial court found that the accused price reductions were motivated by business considerations, and not by malice or an intent to injure competition or a competitor. The Court of Appeals examined the full record of the evidence and affirmed these findings, ruling that they controlled the decision and demanded affirmance of the trial court.

It should be noted that no circumstance of discrimination in price, either between competing purchasers or between geographic areas, is involved in this case. The price reductions which are accused were general in character, and were available to all takers, without discrimination of any kind. They were likewise unaffected by quantity considerations, and all sales were in carload lots.

Thus the judgment below decided only issues of fact, the event of which defeated petitioner's complaint on the

general issue of its truth. The case comes to this Court upon reviewed and affirmed findings that:

1. Respondents' accused prices were not unreasonably low or even "low" in the competitive market where they were made, nor were they "low" in the sense of unprofitability. On the contrary they were found to be above competitive price levels, and to be profitable.

2. The accused prices were not made to destroy competition or eliminate a competitor, but were motivated by lawful business and economic considerations, which they fairly served.

Serious legal questions might lurk behind findings of an opposite import, but none are reached or raised in the single factual conclusion that the events alleged did not take place.

ARGUMENT.

Respondents respectfully submit that no question of importance, or even of general interest, is presented upon the record of this case. A review of the sufficiency of the evidence to sustain the findings affirmed below could result only in a second affirmance or a reversal with instruction to retry the issues together with others not reached and undecided in the first trial. Such a review would concern and affect only the immediate parties to this action, and there would be no general or public concern in its disposition.

The case involves no subject of law wherein there is conflict of decision. The opinion of the Court of Appeals is wholly consistent with existing precedents which bear upon the issues decided. The case of *Balian Ice Cream Co.* v. *Arden Farms Co.*, 104 F. Supp. 796, aff'd 231 F. 2d 356, cert. den. 350 U. S. 991, reh. den. 351 U. S. 928, is a direct parallel in its facts and conclusion, and the case is both cited and followed by the Court of Appeals. The case of *Spencer* v. *Sun Oil Co.*, 94 F. Supp. 408, is likewise in point upon some of the issues, and the judgment below is wholly consistent therewith. We know of no other precedents which bear directly upon the decision in this case, and petitioner has cited none which are applicable to its facts.

If we read correctly the opinions of this Court relating to its policy respecting review by the writ of certiorari, this case is inappropriate to the exercise of its jurisdiction. We note the pronouncement made in *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, and suggest that here as there the case turns on an "appreciation of the evidence." We further note the comment of this Court in *Southern Power*

Co. v. *North Carolina Public Service Co., et al.*, 263 U. S. 508, and urge that here as there the issues for decision are "primarily a question of fact." We understand the import of these decisions, together with other less formal manifestations of policy, to be that the Court will not accept for review causes which merely seek to retry affirmed issues of fact.

We note further that even in instances in which causes were accepted for full review, the Court has declined to re-examine concurrent findings of fact resulting from trial and previous review. We read *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275; *Williams Mfg. Co.* v. *United Shoe Machinery Corporation*, 316 U. S. 364, 367, and *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 331, to mean that the Court will not extend its review to become a trial *de novo* upon the record. The review petitioned in this proceeding, if granted, will require such a retrial before the judgments below may be disturbed.

The best reason for refusing a review is always that the judgments below are correct. This we assert with confidence, recognizing that at this point we must rest our assertion upon the concurring findings and opinion of two experienced lower courts. The elaborate circumlocution of the petition, with its argumentative appendices can and will be met with detailed analysis of the evidentiary record if the Court decides that full review is toward. For the purposes of the issue presently before the Court, we content ourselves with the observation that the evidence was in conflict, as is shown by the opinion and findings sought to be reviewed. In the event that the Court shall decide to try the issue *de novo* upon the record, we shall undertake cheerfully to demonstrate that the evidence not only supports but demands the findings made and affirmed below.

The respondents respectfully pray that the petition for a writ of certiorari be denied.

Respectfully submitted,

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